E COPY

Supreme Court, U. S.
F I L E D
OCT 18 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-477

EDWARD L. STEPHENSON, GARRICK C. STEPHENSON and THE CENTRAL TRUST COMPANY, as Trustees of SAMUEL F. STEPHENSON,

Petitioners,

against

KARL F. LANDEGGER, CARL C. LANDEGGER, GEORGE F. LANDEGGER, PARSONS & WHITTEMORE, INC., and THE BLACK CLAWSON COMPANY,

Respondents.

BRIEF OF RESPONDENTS KARL F. LANDEGGER, CARL C. LANDEGGER, GEORGE F. LANDEGGER AND PARSONS & WHITTEMORE, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAX FREUND
JOEL W. STERNMAN
ROSENMAN COLIN KAYE PETSCHEK
FREUND & EMIL
575 Madison Avenue
New York, New York 10022
Attorneys for Respondents Karl F. Landegger, Carl C. Landegger, George F. Landegger and Parsons & Whittemore, Inc.

TABLE OF CONTENTS

	PAGE
Question Presented for Review	2
Statement of the Case	2
Argument	
I—No Reasons Have Been Advanced or Exist for the Grant of Certiorari	5
II—The Decision Below Properly Affirmed the District Court's Exercise of Discretion in Dismissing the Amended Complaint	7
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Drachman v. Harvey, 453 F.2d 722 (2d Cir. 1971)	7
Gleicher v. Times-Columbia Distributors, Inc., 283 App. Div. 709, 128 N.Y.S.2d 55 (1st Dep't 1954)	7
Goldboss v. Reimann, 55 F.Supp. 811 (S.D.N.Y. 1943), aff'd on opinion below, 143 F.2d 594 (2d Cir. 1944)	8
Myer v. Myer, 271 App. Div. 465, 66 N.Y.S.2d 83 (1st Dep't 1946), aff'd, 296 N.Y. 979, 73 N.E.2d 562 (1947)	8
Tenney v. Rosenthal, 6 N.Y.2d 204, 160 N.E.2d 463, 189 N.Y.S.2d 158 (1959)	8

PAGE

Statutes and Rules:

Rules of the Supreme Court:
Rule 19(1)(b) 5, 6, 10

Federal Rules of Civil Procedure:
Rule 17(b) 7
Rule 25(a)(1) 7

New York Business Corporation Law:
Section 626(b) 7
Section 1319(a)(2) 7

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-477

EDWARD L. STEPHENSON, GARRICK C. STEPHENSON and THE CENTRAL TRUST COMPANY, as Trustees of SAMUEL F. STEPHENSON,

Petitioners,

against

KARL F. LANDEGGER, CARL C. LANDEGGER, GEORGE F. LANDEGGER, PARSONS & WHITTEMORE, INC., and THE BLACK CLAWSON COMPANY,

Respondents.

BRIEF OF RESPONDENTS KARL F. LANDEGGER, CARL C. LANDEGGER, GEORGE F. LANDEGGER AND PARSONS & WHITTEMORE, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Karl F. Landegger, Carl C. Landegger, George F. Landegger and Parsons & Whittemore, Inc. (hereinafter collectively referred to as "Respondents") submit this brief in opposition to the petition for a writ of certiorari filed by Petitioners Edward L. Stephenson, Gar-

rick C. Stephenson and The Central Trust Company, as Trustees of Samuel F. Stephenson (hereinafter collectively referred to as "Petitioners").

Petitioners seek to have this Court review a judgment and opinion of the United States Court of Appeals for the Second Circuit affirming an order of the United States District Court for the Southern District of New York which dismissed the amended complaint of their alleged predecessor-in-interest.

Question Presented for Review

In a minority stockholders' action in the federal court by virtue of diversity of citizenship, did Petitioners have the right to be substituted as plaintiffs upon the death of the named plaintiff?

Statement of the Case

The action below, a derivative stockholders' suit, was instituted by one Samuel F. Stephenson in the United States District Court for the Southern District of New York.

The opinion of the District Court, 337 F. Supp. 591 (S.D.N.Y. 1971), concisely states the relevant facts:

> "The plaintiff, Samuel F. Stephenson (hereinafter referred to as 'Stephenson') was for many years the registered and beneficial owner of ten thousand (10,000) shares of Clawson common stock. However, it now appears that on February 24, 1969, five months before institution of the present action, Stephenson

created a revocable trust and executed a will. It further appears that, although in both the original and amended verified complaints Stephenson alleged that he was the owner of the ten thousand (10,000) shares of Clawson stock, he had in fact delivered this stock to the trustees of the trust at the time of its execution on February 24, 1969, endorsed by him, and, further, had confirmed to the corporate trustee by letter dated March 12, 1969, that such stock constituted an asset of the trust. * * *

"Stephenson, the sole grantor, was also the sole income beneficiary. Upon his death, certain fixed or ascertainable amounts were to be distributed from the trust principal to certain [individuals and a university] * * *. Stephenson died on March 9, 1971." (337 F.Supp. at 592; A9-A10).*

The trustees of the trust referred to in the portion of the opinion just quoted are the Petitioners herein. They sought to be substituted as plaintiffs following Stephenson's death. The District Court, in denying Petitioners' application for substitution, cited cases involving the substantive law of New York as to stockholder rights, and stated:

"* * * on [Stephenson's] death the remainder interests, in fee or in trust, became operative not by operation of law but by contract, *i.e.*, under the provisions of the trust * * *. While Stephenson may have had a sufficient interest to institute the action, the right to continue the action terminated when he effectively disposed of the stock other than by operation of law, *i.e.*, by the trust contract which became irrevocable on his death. Accordingly, it is held that * * * the trustees * * * take by contract and not by operation of law" (citations omitted) (337 F. Supp. at 594; A12-A13).

* Page numbers preceded by the letter "A" refer to the appendix to the petition for a writ of certiorari.

The District Court further held that, under New York law, the only action which Petitioners themselves (as Trustees) had the right to bring was one involving transactions after February 24, 1969 (the date on which the trust was created) or March 9, 1971 (the date on which Stephenson died).* It found that matters actionable after these dates could not be determined from the amended complaint, and held that a new pleading would be required to restate any causes of action limited by the new dates (337 F. Supp. at 594; A13-A14).

Accordingly, the District Court, in its discretion, denied the motion for substitution and dismissed the amended complaint.

The Court of Appeals affirmed *per curiam*. It agreed with the holding of the District Court that, under the New York authorities, the beneficial interest of Stephenson in the Clawson stock, "while sufficient to institute that action, was terminated upon his death when the remainder interests became operative not by operation of law but by contract, i.e., under the provisions of the trust which became irrevocable upon his death* * *. The trustees * * *, who derive their interests by contract and not by operation of law, may assert claims involving transactions only after February 24, 1969 (date of creation of the trust) or March 9, 1971 (date of death)" (A5-A6).

As to those limited claims, the Court of Appeals agreed with the decision of the District Court that the amended complaint should be dismissed. It noted that this determination traditionally was left to the sound discretion of the district judge, and stated that it would not interfere

* It did not decide which date would control an action by Petitioners.

with such discretion "absent a clear showing of abuse", especially where, as here, an independent examination of the entire record left it "with the firm conviction that Judge Tenney's ruling in this respect represents an eminently sound exercise of discretion" (A6).

Since Petitioners could only sue in respect of acts after a certain date, and since the amended complaint was encumbered with allegations involving a much broader time period, it was dismissed.

Furthermore, it is clear that Petitioners, under the terms of the Trust, cannot continue to own the Clawson stock. They must dispose of it by sale or transfer to the remaindermen. (See §4.4 of the Trust Agreement reprinted in the Appendix below at 19a.)

As noted above, under the law of New York, such ownership is the *sine qua non* of their status to become, and to continue as, plaintiffs. Indeed, Petitioners do not state or represent that they continue to hold such stock and, if so, how long they can do so.

ARGUMENT

I

NO REASONS HAVE BEEN ADVANCED OR EXIST FOR THE GRANT OF CERTIORARI.

Rule 19(1)(b) of the Rules of this Court (U.S. Sup. Ct. Rule 19(1)(b)), provides as follows:

> "Rule 19. Considerations governing review on certiorari
>
> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be

granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioners herein have made no attempt to assert the existence of any reason, either in conformity with Rule 19(1)(b) or otherwise, for this Court to exercise its discretionary jurisdiction to grant certiorari.

II

THE DECISION BELOW PROPERLY AFFIRMED THE DISTRICT COURT'S EXERCISE OF DISCRETION IN DISMISSING THE AMENDED COMPLAINT.

At issue herein is the denial of a motion for substitution pursuant to Rule 25(a)(1), Fed.R.Civ.P.,* and the consequent dismissal of a derivative action. Such denial and dismissal were sound both on the law and as a proper exercise of the discretion of the District Court, and affirmance thereof by the Court of Appeals likewise was correct.

(A)

1. A stockholder of a foreign corporation doing business in New York may sue derivatively in behalf of his corporation only in respect of transactions occurring after he acquired his stock. N.Y. Bus. Corp. Law §§626(b), 1319(a)(2) (McKinney ed. 1963).**

2. Under the law of New York, a stockholder loses his right to maintain a derivative action in behalf of his corporation, and such action must be dismissed, if he ceases to be a stockholder after instituting the action. See, *e.g.*, *Gleicher* v. *Times-Columbia Distributors, Inc.*, 283 App.

---

* Rule 25(a)(1) provides, in pertinent part, as follows: "If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties."

** There is no dispute that New York law is controlling herein. See Rule 17(b), Fed.R.Civ.P., and *Drachman* v. *Harvey*, 453 F.2d 722, 725-27 (2d Cir. 1971).

Div. 709, 128 N.Y.S.2d 55 (1st Dep't 1954).* Indeed, because under New York law, which controls, the action is, in effect, personal to the litigating stockholder, a derivative action will be dismissed where he personally is estopped from suing—and this even though other stockholders may not be so barred. See *Goldboss* v. *Reimann*, 55 F. Supp. 811, 819-20 (S.D.N.Y. 1943), *aff'd on opinion below*, 143 F.2d 594 (2d Cir. 1944).

3. The transfer by which Petitioners herein, as Trustees, acquired their interest in the shares was one by contract and not by operation of law. See *Myer* v. *Myer*, 271 App. Div. 465, 471, 66 N.Y.S.2d 83 (1st Dep't 1946), *aff'd*, 296 N.Y. 979, 73 N.E.2d 562 (1946):

> "Plaintiffs as trustees acquired title to their father's stock, not by operation of law but by the affirmative act of their father who, in executing the trust agreement, made a voluntary gift to plaintiffs in trust, coupled with a remainder interest. The plaintiffs' title came, therefore, by contract with their father, and not by the intervention of any court or legal forum, or under circumstances that might be considered a transfer by operation of law."

4. Thus, Petitioners clearly could not sue with respect to claims arising prior to their acquisition of the stock.

(B)

1. As to claims arising after such acquisition, the amended complaint, even given its broadest possible inter-

* In this regard, under New York law, minority stockholders actions are unlike derivative actions instituted by directors, which continue even after the plaintiff-director ceases to be a director. *Tenney* v. *Rosenthal*, 6 N.Y.2d 204, 160 N.E.2d 463, 189 N.Y.S.2d 158 (1959).

pretation, can only be construed as attacking transactions up to the date of Stephenson's death, March 9, 1971.

2. On that date, as noted above, Petitioners were obligated under the Trust Agreement either to sell the Clawson stock to pay specific legacies or to transfer it to the remaindermen. Once they sell or transfer, they cannot under the law of New York, as noted above, sue derivatively in behalf of Clawson.

(C)

In summary, on the death of Stephenson, his life interest as beneficiary and his power to revoke the Trust terminated. As a consequence, he left no interest in the Clawson stock to which Petitioners, as Trustees, succeeded on account of his death by operation of law. Their interest in the Clawson stock was acquired by virtue of Stephenson's *inter vivos* transfer in February, 1969 when he established the Trust, and not by operation of law in March, 1971 upon his death. Petitioners, therefore, are in no better position to be substituted for Stephenson than anyone to whom Stephenson could have transferred his stock in February, 1969; indeed, since their status as stockholders under the Trust Agreement is short-lived (by the terms of that Agreement they must sell or transfer the stock) they cannot continue as plaintiffs in this action. Finally, the amended complaint challenges transactions long prior to the date Petitioners acquired the Clawson stock.

Conclusion

The discretion of the District Court in denying substitution and dismissing the amended complaint has been exercised correctly and adversely to Petitioners' contentions, and such exercise has been affirmed by the Court of Appeals.

There is no basis for invoking this Court's discretion under any of the considerations set forth in Rule 19(1)(b) of the Supreme Court Rules.

Accordingly, the petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

MAX FREUND
JOEL W. STERNMAN
ROSENMAN COLIN KAYE PETSCHEK
FREUND & EMIL
575 Madison Avenue
New York, New York 10022
Attorneys for Respondents Karl F. Landegger, Carl C. Landegger, George F. Landegger and Parsons & Whittemore, Inc.